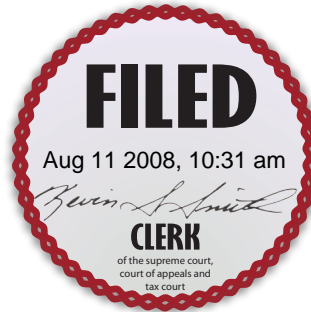


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LARRY R. MITCHELL,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-0801-CR-37

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0703-MR-5

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Larry Mitchell appeals his sentence for murder.¹ He raises the following restated issues:

- I. Whether the maximum sentence of sixty-five years was appropriate.
- II. Whether the trial court abused its discretion by ordering that the murder sentence would be consecutive to Mitchell's sentence for an unrelated battery conviction.

FACTS AND PROCEDURAL HISTORY

Jason Reeves, Jermaine Reeves, and Terry Wadell paid Mitchell five hundred dollars and a half-ounce of cocaine to kill DaVonda Tharbs in retaliation for a remark she made about an earlier shooting involving their mother. In the early morning of April 29, 2006, Mitchell and the three men drove to Tharbs's apartment. Wadell gave Mitchell a .40 caliber handgun to use.

When they arrived at the apartment, Mitchell walked to the back of the apartment. He stood in the shadows near a window, which had closed blinds. He waited until he saw a woman's shadow pass by the window and fired three shots. Two of the shots struck J.T., Tharbs's younger sister, causing her death. Mitchell then ran back to the car telling the men to "Go," and that he "got the bitch." *Tr.* at 832.

The State charged Mitchell with the murder of J.T. Mitchell was convicted and sentenced to sixty-five years to be served consecutive to a four-year sentence imposed for an unrelated battery conviction. Mitchell now appeals.

¹ See IC 35-42-1-1(1).

DISCUSSION AND DECISION

I. Appropriate Sentence

Mitchell claims that his sixty-five year sentence is inappropriate. The sentencing statute for murder reads, “A person who commits murder shall be imprisoned for a fixed term of between forty-five and sixty-five years, with the advisory sentence being fifty-five years.”

IC 35-50-2-3. Sentencing decisions, within the statutory range, are reviewed only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion arises if the sentencing decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* This court can revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

As to the nature of the offense, the defendant committed murder, a heinous crime, for money, drugs, and revenge. He committed the murder from a concealed position, hiding behind a closed window waiting for his victim to show herself. He then fired indiscriminately into the window, ultimately killing an unintended victim

As to the character of the offender, Mitchell has a prior criminal history including two juvenile adjudications, and convictions as an adult for carrying a handgun without a license, criminal trespass, and criminal conversion. Mitchell continued to commit crimes after the murder, as evidenced by his subsequent conviction for battery. Additionally, in an interview with the magazine *Sight 360*, Mitchell glorified his gang lifestyle. Mitchell has failed to

show that his sentence is inappropriate either in regard to the nature of the crime or his character.

Mitchell also contends that the trial court considered improper aggravating factors in imposing his sentence. Trial courts must enter a sentencing statement that explains reasons for imposing a particular sentence. *Anglemeyer*, 868 N.E.2d at 490. If the sentencing statement includes aggravating and mitigating factors, the record must support those factors. *Id.*

Mitchell claims that the trial court improperly considered material elements of the crime of murder as aggravators. *Appellant's Br.* at 11. Specifically, he asserts that using the unintended victim, retaliation, and killing for money aggravators was improper because they prove the material element of intent. *Id.* We disagree. Although a material element of a crime may not be used as an aggravating factor, the trial court may consider particularized circumstances when evaluating the nature of the offense. *McElroy v. State*, 865 N.E.2d 584, 589-90 (Ind. 2007). Murder is the knowing or intentional killing of another human being. IC 35-42-1-1(1). None of the aggravators Mitchell cites is an element of the crime of murder. They are, however, the particularized circumstances that demonstrate the heinous nature of his crime.

Mitchell also maintains that the trial court improperly considered the aggravator of lying in wait because it was not supported by the facts in the record. *Appellant's Br.* at 12. "Lying in wait involves the elements of watching, waiting, and concealment from the person killed with the intent to kill or inflict bodily injury upon that person." *Ingle v. State*, 746

N.E.2d 927, 940 (Ind. 2001). Here, Mitchell approached the apartment from the back and concealed himself in the shadows behind a window with the blinds drawn. He watched and waited until a woman's shadow passed by the window and then opened fire through the window. On these facts, we find that the record supports the lying in wait aggravator.

II. Consecutive Sentences

Mitchell claims that the trial court improperly ordered his murder sentence to be served consecutive to his sentence for an unrelated battery conviction by not providing adequate reasons for its decision. *Appellant's Br.* at 17. Sentencing decisions, including the imposition of consecutive sentences, are reversed only upon a showing of abuse of discretion. *Hull v. State*, 839 N.E.2d 1250, 1254 (Ind. Ct. App. 2005). A single aggravating circumstance may support imposing consecutive sentences. *Matthews v. State*, 849 N.E.2d 578, 589 (Ind. 2006). "The imposition of consecutive sentences is a separate and discrete decision from sentence enhancement, although both may be dependent upon the same aggravating circumstances." *Id.* Here, the trial court imposed consecutive sentences for the same stated reasons that supported the imposition of the maximum sentence. *Tr.* at 1133. Because we previously found that the record supported the aggravating factors, we find that the trial court did not abuse its discretion in imposing consecutive sentences based upon those same aggravating circumstances.

Affirmed.

VAIDIK, J., and CRONE, J., concur.